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Sutherland, Asbill & Brennan, L.L.P.

ATLANTA • AUSTIN • NEW YORK • WASHINGTON

1275 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2404

TEL: (202) 383-0100
FAX: (202) 637-3593

January 26, 1998

RANDOLPH J. MAY
DIRECT LINE: (202) 383-0730
Internet: rmav@sablaw.com

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: **CC Docket No. 96-45 (Report to Congress)**

Dear Ms. Salas:

Enclosed for filing in CC Docket No. 96-45 (Report to Congress) you will find an original and nine copies of Comments of CompuServe Incorporated and also a computer diskette containing the petition in "read only" format. Please date stamp the "stamp and return" copy of the petition for return by the messenger.

Please do not hesitate to contact me if you have any questions.

Sincerely,



Randolph J. May

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**FEDERAL STATE JOINT BOARD
ON UNIVERSAL SERVICE**

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**CC Docket No. 96-45
(Report to Congress)**

COMMENTS OF COMPUSERVE INCORPORATED

**Randolph J. May
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0100**

January 26, 1998

Its Attorneys

**CompuServe Incorporated
CC Docket No. 96-45
(Report to Congress)
Initial Comments - January 26, 1998**

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SUMMARY

CompuServe is one of the world's leading providers of consumer and business information services. It acquires regulated basic communications services from facilities-based carriers and combines these basic services with computer processing applications to provide a wide variety of enhanced online information and database services to its subscribers. CompuServe also provides its subscribers access to the Internet, either as part of its proprietary services or on a stand-alone basis. Like many other information service providers ("ISPs"), CompuServe typically provides its services based on a client-server model under which multiple CompuServe subscribers ("clients") are afforded remote access to store or retrieve information in host or "server" computers.

The Commission's interpretations of various provisions of the 1996 Act which are the subject of the Public Notice are fully consistent with the plain language of the Act. In particular, the Commission correctly has determined that Internet access and on-line services do not engage in the provision of "telecommunications," provide "telecommunications service," nor act as telecommunications carriers," and therefore may not be required to make universal service contributions. Moreover, the Commission's interpretations promote the public interest, particularly the public interest in fostering the broad availability of information services to the public at reasonable prices.

The conclusion that ISPs do not constitute "telecommunications carriers" within the meaning of the statutory definitions of the 1996 Act is confirmed by an analysis of the plain language and structure of the 1996 Act, and by evidence Congress ratified the Commission's historical treatment of enhanced service providers. Online services clearly do not constitute "telecommunications" because they are not characterized by any of the elements required of "telecommunications." Moreover, the Commission correctly has pointed to the plain language and structure of Section 254 of the 1996 Act which indicates that Congress understood that information services are distinct from "telecommunications" and not merely a subset of "telecommunications."

"Information services" and "enhanced services" provided over the facilities of common carriers have long been treated as separate and distinct from the basic telecommunications capacity used to transmit those services. In the Computer II proceeding, the Commission drew a bright line distinction between regulated basic communications services and unregulated enhanced services such as online and Internet access services. Nothing in the 1996 Act indicates that Congress intended to change the unregulated status of enhanced service providers. In fact, Congress included in the 1996 Act a definition of "information services" that is substantially equivalent to the Commission's definition of enhanced services, in effect, confirming the continued viability of, and desirability for, the maintenance of, the Commission's Computer II bright line distinction. The Commission's actions in the Universal Service Order and the Non-Accounting Safeguards proceeding, which equate information services with

enhanced services, thereby exempting information services from regulation under Title II of the Act, are fully consistent with the 1996 Act.

The Commission's determination is correct that a competitive, unregulated marketplace is likely to lead to the proliferation of such services on a widespread basis and at affordable prices. Congress expressly recognized that it is the unregulated status of ISPs that has made possible the spectacular growth of innovative information services that the U.S. is experiencing today. Thus, new Section 230 states that it is "the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State Regulation"

The Commission affirmed in its Access Charge Order that the imposition of above-cost access charges on ISPs would likely disrupt the "still-evolving information service industry." Just as the Commission found that the imposition of above-cost access charges on ISPs would dampen the growth of information services, so too would the imposition of universal service contribution requirements and any associated regulatory burdens that impose additional costs. ISPs already contribute fully to the support of universal service through the rates they pay for underlying basic communications services acquired from telecommunications carriers. Requiring ISPs to make universal service contributions would amount to double recovery, the cost of which would be passed on to information service consumers in the form of higher rates.

Finally, the size of universal service funds will not be affected by whether or not ISPs are required to contribute. Rather, the size of the funds is determined by the subsidies that the Commission determines are required for support to high cost areas, low income persons, schools and libraries, and rural health care providers. Without ISP contributions, the Commission still will collect from the contributors the targeted amounts. But if ISPs are required to contribute, consumers of information services will confront higher prices, and demand for such services almost surely will be dampened, especially among the very groups that Congress has chosen to support through universal service mechanisms.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**FEDERAL STATE JOINT BOARD
ON UNIVERSAL SERVICE**

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**CC Docket No. 96-45
(Report to Congress)**

COMMENTS OF COMPUSERVE INCORPORATED

CompuServe Incorporated ("CompuServe"), by its attorneys, hereby files its comments in response to the Commission's Public Notice, issued January 5, 1998, requesting comments in preparation for its Report to Congress on Universal Service, FCC 96-45 (Report to Congress). The 1998 appropriations legislation for the Departments of Commerce, Justice, and State, H.R. 2267, directs the Commission to review the implementation of the provisions of the Telecommunications Act of 1996 ("1996 Act") relating to universal service. The report to Congress is to describe the extent to which the Commission's interpretations in a number of areas are consistent with the plain language of the Communications Act of 1934, 47 U.S.C. 151 et seq., as amended by the 1996 Act, and the impact of such interpretations on universal service.

CompuServe is one of the world's leading providers of consumer and business information services. It acquires regulated basic communications services from facilities-based

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carriers and combines these basic communications services with computer processing applications to provide a wide variety of enhanced online information and database services to subscribers. CompuServe also provides its subscribers access to the Internet, either as part of its proprietary services or on a stand-alone basis. Like many other information service providers ("ISPs"), CompuServe typically provides its services based on a client-server model under which multiple CompuServe subscribers ("clients") are afforded remote access to store or retrieve information in host or "server" computers.

In CompuServe's view, the Commission's interpretations of various provisions of the Act which are the subject of the Public Notice are fully consistent with the plain language of the 1996 Act. Moreover, the Commission's interpretations promote the public interest, particularly the public interest in fostering the broad availability of information services to the general public at reasonable prices.

I. THE COMMISSION CORRECTLY HAS DETERMINED THAT INFORMATION SERVICE PROVIDERS LIKE COMPUSERVE DO NOT PROVIDE "TELECOMMUNICATIONS," ARE NOT "TELECOMMUNICATIONS CARRIERS," AND THEREBY ARE NOT SUBJECT TO EITHER MANDATORY OR DISCRETIONARY UNIVERSAL SERVICE CONTRIBUTIONS

Section 254(d) of the Act provides that "telecommunications carriers" shall be required to contribute to any universal service subsidies which may be mandated by the Commission and that "[a]ny other provider of interstate telecommunications" may be required to contribute "if the public interest so requires." "Telecommunications carriers" and "other providers of telecommunications" are the only entities potentially subject to universal service contribution requirements.

Revised Section 3 of the Communications Act sets forth the following definitions which are relevant to a determination of whether certain entities are potentially subject to the Section 254 contribution requirements:

- (43) The term 'telecommunications' means the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.
- (44) The term 'telecommunications carrier' means any provider of telecommunications services A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services
- (46) The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.
- (20) Information service is the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications

Information service providers such as CompuServe which provide online and Internet access services neither engage in the provision of "telecommunications," provide "telecommunications service," nor act as "telecommunications carriers." As such, the Commission's decisions that ISPs are not subject to universal service contribution requirements on either a mandatory or discretionary basis are fully consistent with the Communications Act.

**A. Online And Internet Access Services Do Not Constitute
"Telecommunications"**

Three essential elements define "telecommunications" within the meaning of Section 3(43) of the Act: (1) the service transmits information "between or among points specified by the user," (2) the information transmitted is "of the user's choosing," and (3)

transmission of information occurs “without change in the form or content of the information as sent and received.” All three elements must be present for a service to be considered “telecommunications.”

Online services clearly do not constitute “telecommunications” because they are characterized by none of these three elements. The Commission reached this same conclusion in its Universal Service Order. The list of examples provided by the Commission of “interstate telecommunications” does not contain online services or Internet services.^{1/} More fundamentally, the Commission concluded that “ISPs alter the format of information through computer processing applications such as protocol conversion and interaction with stored data,” which is not consistent with the statutory definition of “telecommunications” that includes “transmissions that do not alter the form or content of information sent.”^{2/}

The Commission also pointed out that the language and structure of Section 254 itself indicates that Congress clearly understood that information services are distinct from telecommunications, not merely a subset of telecommunications. The Commission pointed out that Section 254(h) states that the Commission must “enhance access to advanced telecommunications and information services.” thereby drawing a clear distinction between “telecommunications” and “information services.”^{3/}

^{1/} In the Matter of Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, at para. 780 (1997) (*Universal Service Order*).

^{2/} *Universal Service Order*, 12 FCC Rcd 8776, at para. 789.

^{3/} *Id.* Throughout other portions of Section 254, Congress also distinguished between “telecommunications” and “information” services. For example, while subsection 254(b)(4) extends the potential universal service contribution requirement to all providers of

Online services do not transmit information between or among points specified by the user. Although the user chooses from which point to initiate the service, the online service provider chooses the computer locations through which and with which the user interacts. Various online databases may be located in different physical locations -- possibly even from one day to the next -- and the user has no choice in the matter. For example, e-mail messages fall outside this element because e-mail clearly entails the storage and retrieval of a message at a computer designated by the online provider, not the user. Indeed, the storage and retrieval components of e-mail clearly make it an "information service" under the 1996 Act definition.

Also, online services do not transmit information only of the user's own choosing. For example, information retrieval services and computer games obviously do not transmit information of the user's own choosing. Information is supplied through interaction with the provider's host computers.

And, the transmission of information via online services does not occur without change in the form or content of the information as sent and received. This is true even for "messaging" services such as e-mail. Apart from the fact that e-mail involves storage and retrieval, a recipient of an e-mail message transmitted by an online service provider receives different content than that sent by the user, namely, header information which identifies the sender, the sender's return address, the type of protocols and character sets employed, the various

"telecommunications," subsections 254(b)(2) and (b)(3) establish the goal of providing consumer access to "telecommunications and information" services.

gateways through which the message passes, as well as date and time stamps for the message.⁴⁷

The form of an e-mail message also is altered, for example, when the text wraps to the next line in different places on the sender's and the recipient's screens. Information retrieval services also change the form of information transmitted to the extent information is compressed for storage and then uncompressed for retrieval.⁴⁸

The characteristics of Internet access services are similar to online services in this regard. Internet access providers also do not transmit information between points of the users' choosing. Just as with online services, the user does not choose the location of the Internet computers with which it will interact. Content providers, not the user, determine the locations of the various host computers which may be involved with each session. Information transmitted via Internet access services also undergoes changes in form and content by virtue of the particular codes and protocols employed by the provider. E-mail messages transmitted via Internet access providers undergo the same form and content changes described above for proprietary online service e-mail. Moreover, the information contained in "home pages" on the World Wide Web is received differently by various users depending upon the graphic and text

⁴⁷ As described above, e-mail also does not satisfy the second element of "telecommunications" because e-mail automatically adds header information not of the user's choosing.

⁴⁸ The Commission expressly found that data storage and retrieval applications similar to e-mail are considered enhanced services rather than basic transmission services. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384, 420-21 (1989), *recon.*, 84 FCC 2d 50 (1981), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, 56 Rad. Reg. 2d (P&F) 301 (1984).

capabilities of the user's computer and the interaction with the provider's chosen protocols. In sum, the Commission has correctly concluded that neither online services nor Internet access services constitute "telecommunications" within the meaning of the 1996 Act.

B. Providers Of Online And Internet Access Services Are Neither "Telecommunications Carriers" Nor "Other Providers Of Telecommunications" Subject To Potential Universal Service Contribution Requirements

As described above, online and Internet access services do not constitute "telecommunications" within the meaning of Section 3(43) of the Act. Providers of online services and Internet access services, therefore, by definition cannot be "telecommunications carriers" or "other providers of telecommunications" which are subject to potential universal service contribution requirements. This conclusion, based on an interpretation of the specific statutory definitions adopted as part of the 1996 Act as well as the Act's structure, is supported by analysis of the Commission's historical treatment of enhanced service providers and the 1996 Act as a whole.

The 1996 Act does not modify the regulatory framework adopted in the 1980 Computer II proceeding in which the Commission first established a dichotomy between regulated "basic" communications services and unregulated "enhanced" services.⁶⁷ In Computer II, the Commission determined that a basic service is the offering of a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."²¹ Enhanced services are defined as:

⁶⁷ Computer II, 77 FCC 2d 384.

²¹ Computer II, 77 FCC 2d 384, at 420-21.

services offered over common carrier transmission facilities which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information.^{8/}

In its Universal Service Order, the Commission stated that the "definition of enhanced services is substantially similar to the definition of information services."^{9/} The Universal Service Order cites the Non-Accounting Safeguards Order, in which the Commission earlier had concluded that all services previously considered "enhanced services" are "information services."^{10/} In the Non-Accounting Safeguards Order, the Commission stated it was preserving the definitional scheme by which information services are exempted from regulation under Title II of the Act to ensure regulatory certainty and continuity.^{11/} The Universal Service Order also emphasized the value of promoting regulatory certainty and continuity by preserving the existing regulatory dichotomy.^{12/}

Nothing in the 1996 Act indicates that Congress intended to change the long-standing unregulated status of information service providers such as CompuServe by altering the Commission's basic/enhanced service regime. Indeed, if Congress had intended to make such a

^{8/} Computer II, 77 FCC 2d 384, at 420.

^{9/} *Universal Service Order*, 12 FCC Rcd 8776, at para. 788.

^{10/} *Universal Service Order*, 12 FCC Rcd 8776 at para. 788 *citing* Implementation of Non-Accounting Safeguards of sections 271 and 272 of the Communications Act of 1934, *First Report and Order & FNPRM*, FCC 96-489, at para. 102 (rel. Dec. 24, 1996) (*Non-Accounting Safeguards Order*).

^{11/} *Id.*

^{12/} *Universal Service Order*, 12 FCC Rcd 8776, at para. 788.

dramatic change, surely it would have so indicated in an unmistakable fashion. In fact, Congress indicated that it did not want to make such a change. In Section 230(e)(2), Congress defines “interactive computer service” in a way that encompasses both online services and Internet access services: “any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet” Then, in Section 223(e)(6) Congress declares its intention not “to treat [providers of] interactive computer services as either common carriers or telecommunications carriers.”

New Section 153(44) of the Act requires the Commission to treat all providers of “telecommunications services” as common carriers for purposes of Title II of the Act. If the Commission treats information services as “telecommunications services,” subject to universal service contribution requirements, it would require the Commission for the first time to regulate information services under Title II. Congress, however, provided no indication whatsoever that it wanted the Commission to regulate these services.¹³ In fact, Congress explicitly stated that it

¹³ This conclusion is confirmed by a review of the 1996 Act’s legislative history. In adopting new Section 153(43) of the Act, Congress accepted the Senate’s definition of “telecommunications.” H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 116 (1996). The report accompanying the Senate bill unambiguously explains that the Senate’s definition of “telecommunications” is not intended to include “information services.” S. Rep. No. 23, 104th Cong. 1st Sess. 17-18 (1995) (“This definition excludes those services, such as interactive games or shopping services involving interaction with stored information, that are defined as information services”). The legislative history of new Section 153(46) defining “telecommunications service” is to the same effect. There also, Congress accepted the Senate’s definition, and the report accompanying the Senate bill confirmed that telecommunications services “does not include information services, cable services or ‘wireless’ cable services, but does include the transmission, without change in the form or content, of such services.” *Id.* at 18. These are unambiguous expressions of Congressional intent not to treat what the Commission defined as enhanced services as “telecommunications” or “telecommunications services.”

did not want these services to be subject to regulation. New Section 230 of the Communications Act declares it to be “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . .”^{14/} There can be no question that the Commission’s interpretations are consistent with the Congressional directives.

II. CLASSIFYING ISPs AS TELECOMMUNICATIONS CARRIERS OR REQUIRING UNIVERSAL SERVICE CONTRIBUTIONS FROM ISPs WOULD DIMINISH THE DYNAMIC GROWTH OF THE INFORMATION SERVICES INDUSTRY AND WOULD NOT BENEFIT UNIVERSAL SERVICE

The Commission found in the Computer II proceeding that drawing a bright line distinction between regulated basic services and unregulated enhanced services is critical to the growth of the dynamic information services industry.^{15/} It concluded that such a bright line distinction was crucial in encouraging business entities to make the decisions necessary to bring the American public a wide variety of innovative information services.^{16/} Without a doubt, experience has more than borne out the Commission’s judgment that a competitive, unregulated marketplace is likely to lead to the proliferation of such services on a widespread basis at affordable prices.

In fact, as shown above, Congress itself expressly recognized that it is the unregulated status of ISPs that has made possible the spectacular growth of innovative and productivity-enhancing information services that the U.S. is experiencing today. New Section

^{14/} Section 230(b)(2) (emphasis supplied).

^{15/} Computer II, 77 FCC 384, at 422-23.

^{16/} Id. at 423.

230 of the Communications Act explicitly declares it to be “the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”^{17/}

The Commission recently relied on Section 230 in concluding in its Access Charge Order that ISPs should not be subject to above-cost per-minute carrier access charges.^{18/} The Commission recognized that the imposition of above-cost access charges on ISPs was likely to disrupt the “still-evolving information services industry.”^{19/} Just as the Commission found that the imposition of above-cost access charges on ISPs would dampen the growth of information services, so too would the imposition of universal service contribution requirements and regulatory burdens that impose additional costs.

Moreover, ISPs already do contribute to the support of universal service through the rates they pay for the underlying basic communications services they acquire from telecommunications carriers. If they were required to make direct universal service contributions, in effect, they would be making a double payment. Obviously, extracting such double recovery from ISPs would curtail the demand for information services because these additional costs would be passed on to consumers in the form of higher rates.

Finally, the size of universal service funds will not be affected by whether or not ISPs are required to contribute. Rather, the size of the funds is determined by the subsidies that

^{17/} Section 230(b)(2) (emphasis supplied).

^{18/} In the Matter of Access Charge Reform, CC Docket No. 96-262, *First Report and Order*, FCC 97-158 (rel. May 16, 1997) at para. 345 (*Access Charge Order*).

^{19/} *Access Charge Order*, at para. 344.

the Commission determines are required to meet the Congressional mandate for support to high cost areas, low income persons, schools and libraries, and rural health care providers. If ISPs are not required to contribute, the Commission will still collect from the contributors the targeted amounts. But, if ISPs are required to contribute, as shown above, consumers of information services necessarily will confront higher prices, and consumer demand for such services surely will be dampened, especially among some of the very groups, such as lower income persons and educational institutions, that Congress has chosen to support through universal service mechanisms.

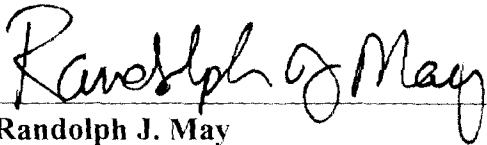
III. CONCLUSION

For the foregoing reasons, the Commission should report to Congress that its interpretations of the definitions contained in the Communications Act as those definitions relate to the provision of “information services” are consistent with the plain language contained in the

Act and also consistent with the Congressional intent to further widespread availability of innovative information services to the public at reasonable prices.

Respectfully submitted,

COMPUSERVE INCORPORATED



Handwritten signature of Randolph J. May in cursive script, written over a horizontal line.

Randolph J. May

**SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0100**

January 26, 1998

Its Attorneys

CERTIFICATE OF SERVICE

I, Teresa A. Pumphrey, do hereby certify that true and correct copies of the foregoing, **"COMMENTS OF COMPUSERVE INCORPORATED,"** served by first-class U.S. mail, postage prepaid, this 26th day of January, 1998, on the following:

Hon. William Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Hon. Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Hon. Harold W. Furchtgott-Roth
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Hon. Michael K. Powell
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

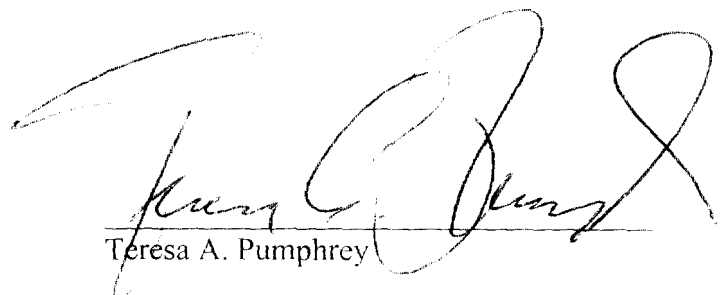
Hon. Gloria Tristani
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

A. Richard Metzger, Jr.
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500
Washington, D.C. 20554

*Sheryl Todd
Federal Communications Commission
Universal Service Branch
8th Floor
2100 M Street, N.W.
Washington, D.C. 20554

Lisa Gelb
Federal Communications Commission
Universal Service Branch
8th Floor
2100 M Street, N.W.
Washington, D.C. 20554

*International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20037



Teresa A. Pumphrey

***By Hand**